Supreme Court of the United States

October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,
against
FELT & TARRANT MANUFACTURING CO.
No. 45.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,
against
A. H. DuGRENIER, INC., Principal, and STEWART & McGUIRE, INC., Agent.
No. 474.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

REPLY BRIEF FOR PETITIONER.

January 2, 1940.

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INDEX

PAGE

POINT I—The fact that the orders for the goods involved in these two cases may have been accepted at the home office of the sellers in other States, does not subject the transactions to a greater burden, or to the danger of a greater burden, than that borne by local transactions 2

POINT II—The contention that the tax at bar violates the enabling act, which is purely a question of State law, has already been rejected by the State Court 6

CONCLUSION 7

Table of Cases Cited

Matter of Gunther's Sons *v.* McGoldrick, 279 N. Y. 148 (1938) 4

Wiloil Corporation *v.* Pennsylvania, 294 U. S. 169 (1935) 2

Other Authorities

Laws of 1934, ch. 873, sec. 1 6

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REPLY BRIEF FOR PETITIONER.

We believe that in our principal briefs in the *Berwind-White* case and the cases at bar and in our reply brief in the *Berwind-White* case, we have sufficiently met the major contentions made by the respondents. However, the respondents in the cases at bar have raised several additional points, not raised in the *Berwind-White* case, with which we now propose to deal.

POINT I.

The fact that the orders for the goods involved in these two cases may have been accepted at the home office of the sellers in other States, does not subject the transactions to a greater burden, or to the danger of a greater burden, than that borne by local transactions.

Respondent in each of these cases urges that the cases can be distinguished from the two companion cases of *Berwind-White* and *Compagnie Generale Transatlantique* because in these cases it is claimed that the orders solicited by the respondents' agents in the City of New York did not ripen into contracts until they had been sent to the home office of the respondent and there accepted.

As is apparent from an examination of the statements of fact set forth in our principal briefs in each of these cases, this circumstance is merely one adopted for the convenience of the seller. The purchaser obviously does not care where the order is accepted. If the fact that the order is accepted in another State might subject the seller to any greater burden of taxation than would result if the order were accepted in the home State, this is so only by reason of its own choice. It could just as easily, after approving the proposed contract, return it to its agent for formal acceptance in New York. It cannot, therefore, complain if, by reason of the particular method by which it chooses to carry on its business, it might be subjected to additional taxation in the States of Massachusetts or Illinois (*Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 [1935]). Furthermore, to permit respondents to avoid this tax by the mere device of sending pieces of paper across State

lines with particular notations inscribed upon them, opens the door wide to wholesale tax evasion and accomplishes no beneficial purpose in protecting interstate commerce. Obviously, the course of commerce is not going to be changed by the form of the sales slips or orders adopted by these sellers in carrying on their business.

But even if for some reason it were necessary for the seller to have the orders sent to its factory to be accepted, we do not see that this circumstance would subject the seller to the danger of any greater tax burden than that borne by transactions containing no such interstate features. The argument of respondent Felt & Tarrant is that it may be subjected to a gross receipts tax in the State of Illinois. We think we have dealt sufficiently with that proposition in our reply brief in the *Berwind-White* case.

But respondent DuGrenier urges that its case is stronger for the taxpayer than the *Berwind-White* case for the reason that "here the contract of sale was made in Massachusetts and it is beyond the possibility of dispute that it would be taxable there" (Br., p. 11). Counsel leaves this bare statement unsupported by argument or precedent. It seems to us that the proposition is far from clear.

Counsel say that this is "the type of case of interstate commerce" (Br., p. 10). In our view, so far as the tax upon the making of the contract is concerned, it is the type case for the application of the rule against multiple taxation. The order is made in one State and the acceptance takes place in another. Neither activity has any realistic physical relationship to any locality. The purchaser might send his order by mail directly to Massachusetts instead of delivering it to the seller's local

agent in New York, as in the case at bar; or the seller might send the order back to its agent in New York, with its approval, to be accepted in New York by its agent. All of these are common business practices. No part of the making of the contract has any inherently local attributes. While no such case has been presented to the Court, and it is hard to tell, in the absence of a concrete factual situation, where the burden of the tax might lie, we think it is very questionable whether such a tax, at least if unapportioned, would be sustained. But certainly if its effect is, as feared by respondent, to produce multiple taxation, it will be held invalid, at least unless apportioned; and we think the decisions of this Court indicate that this would probably be the result.[1]

As we point out at greater length in our reply in the *Berwind-White* case, copies of which will be furnished to counsel in these cases, it is our view that the rule against multiple taxation has application only to a case where the validation of a particular tax would necessarily compel the validation of an identical tax upon the identical counterpart of the identical transaction when imposed by another State. It is further our contention that the fact that some different tax might be imposed upon a different taxpayer and upon a different phase of the same transaction by another State, does not subject interstate commerce to the danger of a burden of multiple taxation

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[1] It should be pointed out that by administrative interpretation and by decision of the State court, mere contracts of sale or the transfer of title without transfer of possession are not taxed. *Matter of Gunther's Sons* v. *McGoldrick*, 279 N. Y. 148 (1938). The tax is imposed only upon local transfers of title and possession to purchasers. The intimations to the contrary in the brief of respondent for the *Berwind-White Coal Mining Company*, page 36, are erroneous.

not borne by local commerce. The reason is that if such tax is valid its burden exists independently of the imposition of the tax at bar, and is a burden which will be equally borne by local commerce.

This proposition is well illustrated in the case at bar. If such a tax may be validly imposed by the State of Massachusetts, then obviously it can be imposed whether or not there exists such a tax as the New York City sales tax. Respondent's goods are subject to the burden of that tax, if it be a burden, irrespective of the tax at bar. The imposition of the tax at bar, therefore, which is borne equally by local sales, cannot increase the burden of respondent's interstate sales.

Furthermore, if the tax is valid, an identical tax can be imposed upon the making of all contracts for local sales by local sellers, in the State of New York. In other words, the burden of the Massachusetts tax bears no relation to the tax at bar and, if it exists at all, is one borne equally by local commerce.

If counsel for respondent DuGrenier share the fear of counsel for *Berwind-White*, that a decision of this Court validating the tax at bar would result in validating the imposition by the State of Massachusetts of an otherwise invalid unapportioned tax upon the making of this contract, we can only say that we can find no possible basis in logic or law for such a proposition.

Of course, an apportioned tax on the making of contracts would be identical in effect with an apportioned gross receipts tax. Each State where some part of the activity took place could impose an apportioned tax upon the transaction, and local transactions would bear the same burden as interstate transactions.

POINT II.

The contention that the tax at bar violates the enabling act, which is purely a question of State law, has already been rejected by the State Court.

The respondents contend that the tax at bar violates the enabling act, pursuant to which the sales tax law was adopted by New York City. They assert that because the enabling act restricts the City's power to levy taxes to "the territorial limits" of the City and does not permit the imposition of any tax "on any transaction originating and/or consummated outside the territorial limits of any such city" (Laws of 1934, ch. 873, sec. 1, Appendix B of Appendix of Statutes), the taxes at bar must be invalidated. This question of State law has already been decided against the respondents in the Court of Appeals, which invalidated the assessments solely on the ground that they violated the Commerce Clause. No such contention is therefore open to the respondents. Accordingly, there is no basis for the request that the cases be remanded.

Conclusion.

The final orders and judgments should be reversed and petitioner's determinations confirmed.

January 2, 1940.

Respectfully submitted,

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